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No. 14

In the Supreme Court of the United States

October Term, 1959

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, THE PACIFIC MOTOR TRUCKING CO. AND GATEWAY MOTOR CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 74

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, AND PACIFIC MOTOR TRUCKING CO. AND GENERAL MOTORS CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

The United States is filing this memorandum to advise the Court as to its position on the issues presented.[1] The essential facts of the controversy are set out in the principal briefs filed with the Court and we shall not undertake to restate them.

We agree with the Commission (R. 31–32, 58–61) and the court below (R. 82–84) that the grant of contract carriage authority to Pacific Motor Trucking Company (PMT), a subsidiary of the Southern Pacific

[1] The United States, the statutory defendant in the three-judge district court below (see 28 U.S.C. 2322), filed a neutral answer neither supporting nor opposing the Commission's orders (R. 67).

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(SP), was consistent with Section 210 of the Interstate Commerce Act, 49 U.S.C. 310. We also concur in the Commission's tacit acknowledgment that the appellants had standing to seek review of the Commission orders. And we agree with the Commission determination (R. 29), accepted by the court below (R. 82), that "the rationale which requires a reading of the Act as a whole and consideration of the policy underlying § 5(2)(b) [of the Interstate Commerce Act] as a guiding light in the issuance of § 207 common carrier certificates is equally applicable to the granting of § 209(b) permits for contract carrier operations" (*ibid.*).[2]

We believe, however, that in the absence of a showing of "special circumstances" establishing special need for issuing a permit to a motor subsidiary of a railroad (as contrasted with the need for contract carrier service generally), this grant cannot be justified either on the ground that the grant was "restricted" to an extent sufficient to comply with the underlying policy of Section 5(2)(b), or that further restrictions were not feasible since they would have had the effect of converting an application for contract carrier operation into a grant of common carrier authority.

Recently, in *American Trucking Assns.* v. *United States*, 355 U.S. 141, this Court directed its attention

[2] Section 5(13) of the Interstate Commerce Act, 49 U.S.C. 5 (13), expressly provides that, for the purposes of Section 5, the term "carrier" covers any "motor carrier subject to part II" of the Act. Section 203(a)(16) of that part, 49 U.S.C. 303(a)(16), specifies that the term "motor carrier" includes both common and contract carriers.

to the obligations of the Commission in passing upon applications for new common carrier authorization by motor carrier subsidiaries of railroads. It pointed out that Section 207 of the Interstate Commerce Act, relating to such applications, does not contain a provision—such as that contained in Section 5(2)(b), governing consolidations, mergers and acquisitions—precluding the grant of an authorization unless the Commission finds it will enable the railroad "to use service by motor vehicle to public advantage in its operations" and that the grant will not unduly restrain competition. Consequently, the Commission is under no statutory mandate to limit grants of Section 207 applications to operations auxiliary or supplemental to train service. Cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419. The Court approved the Commission's view that "the policy of § 5(2)(b) [is] a guiding light, not * * * a rigid limitation" in interpreting Section 207 (355 U.S. at 149). It added, however, that "the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207, and that "the Commission must take 'cognizance' of the National Transportation Policy ["to preserve the inherent advantages of motor-carrier service"] and apply the Act 'as a whole'" (pp. 151–152). The Court concluded that the Commission might occasionally issue motor transport certificates to railway subsidiaries without the normal auxiliary and supplementary restrictions. This, it indicated, would be permissible "where 'special circumstances' prevail, namely, where unrestricted operations by the rail-owned carrier are found on spe-

cific facts and circumstances to be in the public interest" (pp. 149–150. The special circumstances in that case were that the "other carriers frequently failed to handle such traffic, and gave service inferior to that of Motor Transit when they did operate" (p. 153).[3]

In the present case, we find no such "special circumstances" which justify the grant of the contract carriage authority. We point out initially that the restrictions imposed by the Commission in this case do not serve to confine the PMT operation to activities related to the operations of the SP. It is true that the District Court stated that the Commission's report was "in harmony" with the decisions of this Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, and *American Trucking Assns. Inc.* v. *United States*, 355 U.S. 141. (R. 85). It reached this conclusion because it thought that the grant to PMT was "restricted in many respects" (R. 83); that the additional restrictions imposed on a common carrier grant in the *Rock Island* case, *supra*, were not applicable to the contract carrier operations in issue here (R. 81); and that the Commission had therefore complied with the policies underlying § 5(2)(b) "insofar as practicable in dealing with an application for contract car-

[3] The Court cited (p. 150, n. 10) with apparent approval the Commission's statement that the policy of imposing auxiliary and supplemental restrictions should be relaxed in Section 207 cases "only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience."

rier authority" (R. 82). However, none of the restrictions to which the court refers (R. 83)—(1) the limiting of PMT's authority to points on the rail lines of the SP, (2) the requirement that PMT agree to restrict its outstanding common carrier certificate against carriage of automobiles and trucks (a requirement the Commission imposed to avoid questions under Section 210(b) of the Act), and (3) the reservation of the Commission's right to impose in the future such further conditions "as the public interest and national transportation policy may require"—serves the policy embraced in Section 5(2)(b): to "enable [the rail] carrier [SP] to use service by motor vehicle to public advantage in its [SP's] operations."

It is, of course, true that the limitation of PMT's authority to serve General Motors (GM) to points on the rail line of the SP restricts the grant geographically—and, as the Commission indicated (R. 31), protects independent trucking carriers, as well as other rail lines, from competition with PMT for GM's business for car and truck deliveries to more distant points. But such a restriction does not prevent PMT, throughout the very wide area in the West where the SP does have rail lines, from operating under contract for GM in a manner totally unrelated to any "use" by the SP in its "operations."[4]

The other two restrictions are even less in point. The fact that PMT has agreed to give up the bare possibility of transporting cars and trucks under its

[4] See *Pennsylvania Truck Lines, Inc.-Control-Barker Motor Freight*, 5 M.C.C. 9, 11; *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 439.

common carrier certificate[5] does not answer the question whether the significant contract authority it has received will be used to public advantage in SP's operations. And the reservation of power to impose such future conditions as may be necessary or desirable in the public interest is no inhibition on present operations by PMT. Moreover, in the light of the Commission's stated views as to its lack of power to impose restrictions on a contract carrier (R. 30), it offers little promise of meaningful additional restrictions in the future. The end result is that, within the wide geographic bounds prescribed, PMT, despite "the absence of any showing of unusual conditions" (R. 31), has been awarded unrestricted authority to transport GM's cars and trucks.

Nor does the alleged unavailability of a number of the specific restrictions normally imposed on common carrier motor subsidiaries of railroads justify, in the absence of special circumstances, the making of an essentially unrestricted grant. It may be that there are *no* restrictions available which would limit PMT to operations auxiliary or supplemental to those conducted by the SP and, at the same time, permit it to conduct the carry-away service GM wishes. If this is in fact the case, then, in the absence of special circumstances, the underlying policy of Section 5(2)(b) would appear to require a denial of PMT's application.

[5] "[T]here is no evidence which suggests that applicant has ever or is likely to transport such commodities as a common carrier * * *" (R. 32).

The Commission's report (R. 27–28) distinguishes between the authorization made to points on the SP's rail lines and its rejection of any authorization beyond these points on the grounds that (1) the traffic authorized to PMT had previously gone by rail via the parent SP, and (2) GM had publicly stated that, if PMT did not receive the award, it would not give its business to any of the protestants but would instead support certification of a Texas contract carrier, with which it had already done business, or institute proprietary operations of its own. But, in the light of Section 5(2)(b), PMT has no rights or equities in taking over business from its rail parent when a shipper decides to switch from rail to truck service. See *Rock Island* case, *supra*, at 443–444.[6] And, under settled Commission policy,[7] a shipper cannot, by its unilateral action, control the grant or rejection of an application. Although GM "allege[d]" that the existing carriers were unable to offer the "personalized and integrated service" provided by PMT, that the existing contract carriers' services were "in some

[6] The Court there stated that restrictions limiting motor subsidiaries of a railroad to operations merely auxiliary or supplemental to rail operations "hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development."

[7] See, e.g., *Nygard Express Co., Inc.—Contract Carrier Application*, 69 M.C.C. 340, 342; *Gray Contract Carrier Application*, 69 M.C.C. 695, 704. Cf. *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153, 157 (S.D.N.Y.); *Inland Motor Freight* v. *United States*, 60 F. Supp. 520, 524 (E.D. Wash.).

instances" utilized by its competitors, and that none was as conveniently located to GM as PMT (R. 23), these assertions of "special circumstances" were expressly rejected by the Commission as reasons for serving points *beyond* the SP lines because GM had not availed itself of the services of existing carriers (R. 27).

Unless there are "special circumstances" which furnish compelling reasons for granting a permit for motor carriage to a railroad subsidiary, the policy of the Act, as set forth in the National Transportation Policy as well as Section 5(2)(b), is against any railroad-controlled motor carriage not connected with the railroad's own operations. This objective is not met by limiting a railroad subsidiary to part of the independent operating authority it seeks. The only circumstances advanced in the Commission's report to justify operations by PMT independent of the SP's rail operations—that the railroad previously carried the traffic and GM had stated it would not give it to the protestants—are not, we believe, the type of "special circumstances" contemplated by this Court in *American Trucking Assns.* v. *United States, supra.*

Respectfully submitted.

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